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In the Supreme Court of the United States

OCTOBER TERM, 1979

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEONARD BICKWIT, JR.
General Counsel

STEPHEN F. EILPERIN
Solicitor

E. LEO SLAGGIE
IRWIN B. ROTHSCHILD, III
Attorneys
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 601 F. 2d 223.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly held that a licensing fee schedule adopted by the Nuclear Regulatory Commission is consistent with the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a.

STATEMENT

Petitioners challenge a licensing fee schedule adopted by the Nuclear Regulatory Commission on February 9, 1978, providing for reimbursement to the government of the Commission's costs in evaluating and processing applications for licenses to build or operate nuclear power plants or to possess or use defined nuclear materials and for the cost of routine inspections of certain facilities. 43 Fed. Reg. 7210 (1978); 10 C.F.R. Part 170. See Pet. App. 45a-120a. Authority for the fee schedule is derived from the Independent Offices Appropriation Act of 1952 ("IOAA"), 31 U.S.C. 483a, under which federal agencies are authorized and encouraged to recover costs attributable to specific services they render to identifiable recipients. The Commission's final rule revised a fee schedule which had last been amended in 1973.

The Commission's new fee schedule is based on the teaching of two decisions of this Court interpreting the IOAA, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974); *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), and four subsequent opinions of the District of Columbia Circuit reviewing various aspects of the Federal Communications Commission's license fee schedule under the IOAA, *National Cable Television Ass'n* v. *FCC*, 554 F. 2d 1094 (1976); *Electronic Industries Ass'n* v. *FCC*, 554 F. 2d 1109 (1976); *National Ass'n of Broadcasters* v. *FCC*, 554 F. 2d 1118 (1976); *Capital Cities Communications, Inc.* v. *FCC*, 554 F. 2d 1135 (1976). Applying the principles of these cases, the Commission formulated the following general guidelines

which were used in establishing the specific fees set forth in the detailed schedule petitioners challenge (Pet. App. 8a n.3):

1. Fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. The term "specific benefits" includes services rendered at the request of a recipient and all services necessary for the issuance of a required permit, license, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations or obligations under the Commission's regulations;
2. All direct and indirect costs incurred by the NRC in providing special benefits may be recovered by fees;
3. It is not necessary to allocate costs in proportion to the degree of public or private benefit resulting from conferring a special benefit on a recipient;
4. Where the identification of the specific beneficiary of NRC activity is obscure, the cost of the activity may not be included in the cost basis for fees;
5. A fee shall not exceed the sum on the average of the direct and indirect costs which the NRC incurs in furnishing the services for a member of the class of recipients for which the fee is assessed; and
6. Calculation of agency costs shall be performed as accurately as is reasonable and practical, and shall be based on specific expenses identified to the smallest practical unit associated with the rendering of the type of agency service to the particular class of recipients.

Under the revised fee schedule, about 80% of the Commission's budgeted regulatory costs were excluded altogether from consideration for possible recovery (Pet. App. 9a). Such excluded costs include those for activities that do not provide specific benefits to identifiable recipients or that have a wholly independent public benefit, such as research, rulemaking, and policy formulation. See 43 Fed. Reg. 7212-7213 (1978). Moreover, because of the extended period of time required for processing license applications and other activities conferring special benefits, there is a delay in recovering even the remaining 20% of the Commission's regulatory costs. Thus, we are informed that under the revised schedule, the Commission recovered only approximately $13 million of its $288 million budget for fiscal year 1978 and $12.5 million of its $326 million budget for fiscal year 1979.

The United States Court of Appeals for the Fifth Circuit, in an opinion reflecting complete agreement with the pertinent aspects of the decisions of the United States Court of Appeals for the District of Columbia Circuit cited above, affirmed the Commission's license fee schedule in all respects. The court held that the Commission has the authority to recover the full cost of evaluating and approving a license application and providing other services to identifiable beneficiaries, even though these activities may also benefit the public. The court thereby rejected the argument that the Commission could recover no fees from applicants because all of the Commission's activities are in the public interest (Pet. App. 9a-14a) and the alternative argument that the Commission could not assess fees for those aspects of the license application review process that petitioners contended served solely the public interest and were not designed specifically to benefit the applicant (Pet. App. 14a-22a). Nor, in the court's view (Pet. App. 14a-16a),

was the Commission required to allocate the total cost of the review of a license application according to the Commission's sense of the relative weight of the public and private benefits. Thus, the court concluded that the Commission could recover from licensees the costs it incurred in performing environmental reviews required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 *et seq.*, as a prerequisite to issuing a license. The court also upheld the recovery of costs for conducting uncontested hearings on license applications and routine inspections of facilities required by the Atomic Energy Act, as well as administrative and other costs attributable to these activities.

ARGUMENT

The decision of the court of appeals is consistent with the governing statute and, contrary to petitioners' assertion, presents no conflict with prior decisions of this Court or of the United States Court of Appeals for the District of Columbia Circuit.

1. Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a, provides in pertinent part: "It is the sense of the Congress that any work, service, * * * benefit, privilege, authority, use, franchise, license, permit * * * or similar thing of value * * * granted * * * or issued by any Federal agency * * * to or for any person * * * shall be selfsustaining to the full extent possible, and the head of each Federal agency is authorized by regulation * * * to prescribe therefor such fee, charge, or price, if any, as he shall determine * * * to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *."

In *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), the Court held that the IOAA should be interpreted to permit the recovery of "fees," not other assessments more in the nature of taxes, and described a fee in this context to be a payment "incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S. at 340.[1] The Court therefore struck down a fee schedule promulgated by the Federal Communications Commission designed to recover the total portion of the FCC's annual budget attributable to regulation of the cable television industry by assessing cable television operators at an annual rate of 30 cents per subscriber. The Court held that to the extent this annual assessment was calculated to recoup the costs of the FCC's general oversight of the cable television industry, the FCC would be requiring the operators to pay not only for special benefits they received—*e.g.*, in the form of the specific approval of operating authority—but also for the benefits accruing to the public at-large, and to that extent the assessment would be more in the nature of a tax than a fee.

Similarly, in *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), the Court invalidated a fee schedule established by the Federal Power Commission under which it sought to recoup the entire cost of administering the Natural Gas Act and the Federal Power Act (with certain exceptions for costs relating to utilities not subject to FPC jurisdiction) by assessing an annual

[1]The Court observed that a "public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Id.* at 340-341.

fee on natural gas companies with annual operating revenues in excess of $1,000,000 and on jurisdictional utilities. The Court noted that the concept of a "fee" in general presupposes an application for a benefit (415 U.S. at 349), but that under the FPC's schedule, fees could be assessed on utilities or gas companies that had neither asked for nor received the agency's services during the year in question (415 U.S. at 351). The cost of the agency's overall regulation could therefore not be allocated to those companies—except, perhaps, in the case of costs such as those attributable to the development of uniform accounting systems for the industry, for which each company would be an "identifiable recipient" of services who could be assessed a fee notwithstanding the absence of an application requesting those services (*ibid.*).

2. a. Notwithstanding these two decisions of this Court holding that fees may be recovered when an agency bestows a special benefit on an identifiable recipient, petitioners argue that not all costs associated with a Commission function that will concededly confer a special benefit can be recovered. In petitioners' view, the Commission must attempt to ascertain those aspects of the overall function which may be thought to benefit the public and those which are specifically intended to benefit the recipient of a government grant, and to charge the recipient a fee only for costs associated with the latter. In the case of an application for a license, for example, petitioners argue that the Commission cannot require the applicant to pay for costs attributable to the preparation of an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, or an uncontested hearing on the application, both of which, petitioners assert, are stages

in the application review process that are designed to protect the public interest, rather than to bestow a benefit on the ultimate recipient of the license.

Petitioners' argument ignores the fact that the end result of the application process—the issuance of a license—confers a very real and substantial benefit on the recipient. At the same time, the review process leading up to the actual granting of the license presumably is, as a whole, in the public interest. For example, the logic of petitioners' argument would also seem to compel exclusion of the costs of reviewing an application for a license to construct a nuclear reactor for compliance with safety requirements—the very heart of the review process—because a safety review benefits the general public. Accordingly, petitioners' argument could result in the recovery of almost no fees by the Commission. Congress cannot be thought to have authorized and encouraged agencies acting in the public interest to recover fees for the issuance of licenses and, at the same time, intended to deny recovery of those fees because the review process serves the public interest.

Nothing in this Court's decisions in *National Cable Television Ass'n* v. *United States* or *FPC* v. *New England Power Co.*, *supra*, requires exclusion of particular costs incurred in the issuance process merely because the activity involved may benefit the public—at least where, as here, there is no suggestion that the fee based on the agency's overall review costs exceeds the value of the license to the recipient. The Court emphasized in *National Cable Television Ass'n* v. *United States*, *supra*, 415 U.S. at 340, that an agency could recover a fee "incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to * * * run a broadcast station." Such a grant, the Court noted, "bestows a benefit on the applicant, not shared by other

members of society" (415 U.S. at 340-341). The same obviously is true for license applications filed with the Nuclear Regulatory Commission.

In *FPC* v. *New England Power Co.*, *supra*, 415 U.S. at 349-350 & n.3, the Court relied upon Budget Circular No. A-25 (Sept. 23, 1959) in interpreting the IOAA. The Court quoted from the Circular, which provides that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." 415 U.S. at 349 (emphasis supplied by Court). Immediately after this passage quoted by the Court, the Circular provides:

> Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the *full cost* to the Federal Government of rendering that service. [Budget Circular A-25 at 1 (emphasis added).]

There is no indication that the Court disagreed with this statement. See also *Electronic Industries Ass'n* v. *FCC*, *supra*, 554 F. 2d at 1114 n.12.

Moreover, the fact that the Commission here can recoup at most 20% of its regulatory costs under the schedule under review—and in fact recouped far less than that in fiscal years 1978 and 1979—demonstrates that the Commission has carefully analyzed its various activities in order to isolate and charge for only those that confer special benefits. In *National Cable Television Ass'n* v. *United States*, *supra*, and *FPC* v. *New England Power Co.*, *supra*, on the other hand, the agencies had sought to charge the regulated industry with their *entire* regulatory and oversight costs, without tying those

charges to specific benefits bestowed on particular persons. Finally, to require exclusion of certain costs incurred in the application review process would be inconsistent with the very language of the IOAA, which states that "any work, service, * * * license * * * or similar thing of value * * * granted * * * or issued by any Federal agency * * * *shall be selfsustaining to the full extent possible* * * *" (emphasis added).

b. For these reasons, the IOAA does not, contrary to petitioners' assertion (Pet. 14-16), require the Commission to attempt to allocate the total costs of the license review process on the basis of the supposed relative importance of public and private benefits, and to charge licensees only for the latter costs. Nor does the IOAA require the Commission to forgo recovery of fees for certain discrete phases of the review process, such as the preparation of an environmental impact statement or the conduct of uncontested hearings on license applications (see Pet. 10-11, 13). Construction of a nuclear facility is most assuredly "major federal action" for purposes of NEPA, which therefore requires the preparation of the impact statement as part of the review process (42 U.S.C. 4332(C)). Similarly, 42 U.S.C. 2239(a) requires the Commission to hold a public hearing before it may issue a construction permit for a nuclear reactor. A second hearing is required if any person chooses to contest issuance of the operating license and can establish that he has an "interest which may be affected" by that issuance. Consistent with the policy of recovering the cost of all statutorily mandated steps in providing services to identifiable recipients, the Commission collects a fee covering the cost of uncontested hearings,

including the cost of the Commission's trial staff.[2] Recovery of these costs, like recoupment of the expense of preparing an environmental impact statement, are tied directly to the licensing process and may be recovered under the IOAA. See *Electronic Industries Ass'n* v. *FCC*, *supra*, 554 F. 2d at 1115.

For the same reason, the Commission may charge for routine inspections (see Pet. 11-13). These inspections are authorized by statute and mandated by NRC regulations.[3] They confer a special benefit because they are needed to assure the licensee's compliance with the Atomic Energy Act and the Commission's regulations, which is necessary for retention of the license. The absence of a request by this licensee for an inspection is not, in this setting, dispositive. *FPC* v. *New England Power Co.*, *supra*, 415 U.S. at 351.

Petitioners also argue (Pet. 13-14) that the Commission is precluded from recovering its administrative and technical support costs. But, as the court of appeals pointed out (Pet. App. 20a-21a), the cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the employee who reviews the application. Overhead costs—*e.g.*, depreciation and interest on capital plant and equipment and secretarial support—are all part of the normal course of conducting business. Without these supporting services, the employee could

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[2]The Commission determined, as a matter of policy, that to the extent the costs of contested hearings exceed those of uncontested hearings, these additional costs would not be recouped through fees.

[3]42 U.S.C. 2201(o); 10 C.F.R. 50.70 and 70.55.

not perform the service requested by applicants. Recovery of such "indirect" costs, is expressly authorized by the IOAA.

3. Finally, petitioners argue (Pet. 16-17) that the licensing fee schedule adopted in 1973 by the Commission's predecessor, the Atomic Energy Commission, contravenes the IOAA and that petitioners should be refunded the fees—apparently *all* fees—paid under that schedule. The AEC reviewed the 1973 schedule in light of *National Cable Television Ass'n* v. *United States*, *supra*, and *FPC* v. *New England Power Co.*, *supra*, and determined that of the various license fees previously paid, only the assessment of *annual* fees might be questionable. The AEC therefore refunded those fees. Petitioners' challenge to the remainder of the 1973 schedule is apparently the same as that raised to the 1978 schedule—*i.e.*, that the Commission cannot recover the full cost of licensing, inspections and other activities that concededly confer a special benefit on identifiable recipients—and must be rejected for the reasons already given. Therefore, the Fifth Circuit correctly dismissed the challenge to the 1973 fee schedule.[4] In any event, because the 1973 schedule is no longer in effect, its validity does not present a question of continuing interest warranting review by this Court.

[4]Petitioners assert (Pet. 16) that the court of appeals did not discuss their request for a refund of fees paid under the 1973 schedule. However, the court of appeals stated (Pet. App. 23a) that it had examined petitioners' contentions not separately discussed and found them to be without merit. Thus, the court below considered and rejected petitioners' argument on this point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEONARD BICKWIT, JR.
General Counsel

STEPHEN F. EILPERIN
Solicitor

E. LEO SLAGGIE
IRWIN B. ROTHSCHILD, III
Attorneys
Office of the General Counsel
Nuclear Regulatory Commission

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